In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 518

RUSSELL L. STERLING and WILLIAM M. FAIRBANKS, PETITIONERS.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on June 12, 1964. A petition for rehearing was denied on July 20, 1964. By order of Mr. Justice Douglas, the time for filing a petition for certiorari was extended to and including September 18, 1964. The petition for a writ of certiorari was filed on September 19, 1964, and is therefore out of time under Rule 22-2 of the Rules of this Court. In any event, the petition raises no issue warranting review by this Court.

Petitioners were convicted in the United States District Court for the Western District of Washington for violation of 18 U.S.C. 659 by (1) the theft of six cases of Black and White Scotch whiskey shipped in foreign commerce, having a value of more than $100, from a platform, depot and warehouse at Pier 20 in Seattle, Washington, and (2) the knowing possession of such stolen property. Concurrent sentences of imprisonment were imposed on each petitioner, five years for Sterling and three years for Fairbanks (1 R. 1-2, 24, 25). The court of appeals affirmed, 333 F.2d 443.

The evidence showed that a British freighter, whose cargo included 1,460 cases of Scotch whiskey, docked at Pier 20 in Seattle on the morning of October 17. 1962 (3 R. 100-102). Whiskey is normally sent directly from the boat to a bonded locker inside the warehouse. At about 2:30 that afternoon, two customs officials noticed a truck without a gate pass parked on the pier (3 R. 19, 71-72). About a half hour later, it was seen at a different point on the pier with its doors, previously locked, now open (3 R. 21-22, 72-73). Within a few minutes, petitioners were seen approaching the truck. Sterling opened warehouse door No. 4, revealing a "pallet board", used to move cartons, with a number of cases of Black and White Scotch whiskey on it. Sterling, after looking around, started handing cases to Fairbanks, who placed them in the truck (3 R. 24-26, 74-75). A customs employee, who was working inside the warehouse, approached petitioners at this point and started making inquiries of Sterling. Fairbanks jumped in the cab

of the truck and drove off toward the main gate of the pier, where he was stopped (3 R. 60-62, 26-27, 76-77). One of the rear doors of the truck was still open, and six cases of Black and White whiskey were visible (3 R. 27-31, 65, 77-79). It was shown that four cases of the whiskey, containing fifths, had a retail value in the state of Washington of $84 per case, while the two remaining cases, containing tenths, had a retail value of $88.80 per case (3 R. 93, 100, 105, 110, 136-137, 139, 143-144).

1. The participation of both petitioners in the theft of the whiskey was thus adequately proved. Inasmuch as delivery had not been made to the consignee, the merchandise was still part of a foreign shipment of freight. *Winer* v. *United States*, 228 F.2d 944 (C.A. 6), certiorari denied, 351 U.S. 906. Nor did this fact render it improper to prove the value of the merchandise by its retail price in the State of Washington. Cf. *Sachs* v. *United States*, 281 F.2d 189, 191 (C.A. 9); *Russell* v. *United States*, 288 F.2d 520, 525 (C.A. 9); *Torres* v. *United States*, 270 F.2d 252, 256 (C.A. 9), certiorari denied, 362 U.S. 921; 18 U.S.C. 641; 18 U.S.C. 2311; 22 U.S.C. 1360. From any viewpoint, the value was obviously more than $100. The contention that there was insufficient proof of asportation because the merchandise was never removed beyond the limits of Pier 20 is without merit. Carriage of the whiskey from the warehouse to the truck was sufficient to bring petitioners' conduct within reach of the statute. See *United States* v. *DeNormand*, 149 F.2d 622, 624 (C.A. 2), certiorari denied, 326 U.S. 756; *United States* v. *Page*, 277

F.2d 3 (C.A. 2), certiorari denied, 364 U.S. 843.*

2. In his closing argument the assistant United States attorney said (3 R. 178-179):

> We have to prove intent in every case by circumstantial evidence, because there is no other way to prove it.
>
> Now, in this case no evidence was offered by the defense to controvert the obvious circumstantial evidence of intent. * * *
>
> There was no evidence offered by the defense to show that this was their whiskey. There was no evidence offered by the defense to show that this was a mistake.

This comment was not upon the failure of petitioners to testify, but upon the failure of the defense to produce evidence of any sort from other witnesses. Especially in view of the court's instruction that no presumption or inference of guilt should be drawn from the failure of petitioners to testify (3 R. 198-199), there was no prejudicial error in the court's refusal to declare a mistrial. *United States* v. *Wright*, 309 F.2d 735, 738-739 (C.A. 7), certiorari denied, 372 U.S. 929; *Knowles* v. *United States*, 224 F.2d 168, 170 (C.A. 10); *Langford* v. *United States*, 178 F.2d 48, 53 (C.A. 9), certiorari denied, 339 U.S. 938; *Baker* v. *United States*, 115 F.2d 533, 544 (C.A. 8); *Hunt* v. *United States*, 231 F.2d 784 (C.A. 8), cer-

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* It is unnecessary to to consider the sufficiency of the evidence to support the convictions under count 2, inasmuch as the sentences for both counts were concurrent. *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

tiorari denied *sub nom. Hickman* v. *United States*, 355 U.S. 874.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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